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No. 86-1242

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

CITY OF AKRON, STATE OF OHIO; HEALTH COMMISSION, CITY OF AKRON; HEALTH DEPARTMENT, CITY OF AKRON; C. WILLIAM KECK, as Director of Health of the City of Akron; HAROLD K. STUBBS, as Director of Law of the City of Akron,

Appellants,

v.

OHIO MANUFACTURERS' ASSOCIATION; AKRON SELLE COMPANY,

Appellees.

On Appeal from the United States Court of Appeals for the Sixth Circuit

APPELLEES' MOTION TO DISMISS OR AFFIRM

C. WILLIAM O'NEILL
VORYS, SATER, SEYMOUR AND PEASE
52 E. Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6336

Counsel of Record

DUKE W. THOMAS
JOHN W. HOBERG
MARCIA J. MENGEL
VORYS, SATER, SEYMOUR AND PEASE
52 E. Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400

Attorneys for Appellees

March 29, 1987

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OBJECT OF MOTION AND QUESTIONS PRESENTED

By this motion, the Ohio Manufacturers' Association and Akron Selle Company, Appellees herein, seek to obtain a dismissal of this appeal or, in the alternative, to obtain affirmance of the judgment of the United States Court of Appeals for the Sixth Circuit. In connection with dismissal, the questions presented by Appellees' motion are 1) whether Appellants have standing to appeal to this Court under 28 U.S.C. §1254 (2), which permits appeals from a court of appeals' decision holding a state statute invalid as repugnant to the Constitution, where the court of appeals has not struck down any particular provisions of the subject statute; and 2) whether Appellants have standing to appeal an issue to this Court where Appellants were prevailing and non-aggrieved parties as to that issue in the court of appeals. In connection with affirmance, the question presented by Appellees' motion is whether this case presents any substantial questions not previously decided by this Court such that plenary consideration by this Court is warranted.

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APPELLEES' MOTION TO DISMISS OR AFFIRM

Pursuant to Supreme Court Rule 16.1, the Ohio Manufacturers' Association and Akron Selle Company, Appellees, move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Sixth Circuit. The grounds for this motion are as follows:

1) The constitutionality of the ordinance in question has not been definitely and finally adjudicated; therefore, a review by the Supreme Court under 28 U.S.C. §1254 is premature.

2) As prevailing and non-aggrieved parties, the Appellants lack standing to invoke appeal jurisdiction pursuant to 28 U.S.C. §1254 for review of the Court of Appeals' holding that the Occupational Safety and Health Act does not preempt local regulation of workplace safety.

3) This case presents no substantial questions not previously decided by this Court and does not warrant plenary consideration by this Court.

STATE STATUTE INVOLVED

This appeal raises the question of the validity of Chapter 1830 of the Codified Ordinances of the City of Akron, Ohio, ("Akron ordinance") as it applies to employers in Standard Industrial Classification ("SIC") Codes 20 through 39. The Akron ordinance requires the identification of hazards related to the use of hazardous chemicals in the workplace and communication of these hazards to employees. Its provisions substantially parallel the provisions of the Hazard Communication Standard promulgated by the Occupational Safety and Health Administration ("OSHA") pursuant to the Occupational Safety and Health Act of 1970 ("OSH Act"), 29 U.S.C. §651 *et seq.* The Akron ordinance applies to those employers regulated by the OSHA standard—those in SIC Codes 20 through 39—in addition to employers in 25 other SIC Codes.

JURISDICTIONAL STATUTE INVOLVED

Appellants assert that the Supreme Court has jurisdiction over this appeal pursuant to 28 U.S.C. §1254 (2), which provides that this Court may review cases in the courts of appeals:

> (2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to

the Constitution, treaties or laws of the United States . . .

STATEMENT

This case was instituted in Federal District Court by the Ohio Manufacturers' Association[1] and Akron Selle Company[2] on December 5, 1985, to challenge the constitutionality of the Akron ordinance, a "right-to-know law."[3] In their complaint, Plaintiffs asserted that the Akron ordinance, as it applies to employers in SIC Codes 20 through 39, the manufacturing sector, violates the Supremacy Clause of the United States Constitution in that it has been preempted by the OSH Act and by OSHA's Hazard Communication Standard ("OSHA standard"). They sought a declaratory judgment that the Akron ordinance is unconstitutional as applied and a permanent injunction to enjoin the Defendants[4] from enforcing the Akron ordinance against manufacturers.

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[1]The Ohio Manufacturers' Association is an Ohio non-profit corporation. It has no parent company; one subsidiary, the OMA Service Corporation; and no affiliates. The Ohio Manufacturers' Association is supported by the dues of approximately 1600 member companies in the manufacturing business.

[2]Akron Selle Company is a contract metal stamping company incorporated in the State of Ohio with its principal place of business in Akron, Ohio. It has no parent company, no subsidiaries and no affiliates.

[3]"Right-to-know law" is popular terminology for a law which regulates hazard communication.

[4]Defendants are the same as the Appellants herein. They include the City of Akron, State of Ohio, and the following agencies and officers of the city responsible for implementation and enforcement of the Akron ordinance: Health Commission, City of Akron; Health Department, City of Akron; C. William Keck, as Director of Health of the City of Akron; and Harold K. Stubbs, as Director of Law of the City of Akron.

The District Court found that the Akron ordinance is neither expressly nor impliedly preempted by either the OSH Act or the OSHA standard and rendered judgment for the Defendants. *Ohio Manufacturers' Association v. City of Akron,* 628 F. Supp. 623 (N.D. Ohio 1986). The Ohio Manufacturers' Association and Akron Selle Company appealed to the United States Court of Appeals for the Sixth Circuit, which reversed the judgment of the District Court and remanded the case for further proceedings. *Ohio Manufacturers' Association v. City of Akron,* 801 F.2d 824 (6th Cir. 1986). While deciding that the OSH Act itself does not expressly preempt local regulation of workplace safety and health, the Court of Appeals held that the Hazard Communication Standard does preempt such local regulation in SIC Codes 20 through 39. The Court remanded the matter to the District Court to determine which portions of the Akron ordinance are preempted and whether those portions that are not preempted are severable.

Relying upon 28 U.S.C. §1254 (2), Appellants appealed to this Court. They filed their Jurisdictional Statement and docketed their case on January 28, 1987. Appellees received an extension of time until March 29, 1987, in which to file a motion to dismiss or affirm. This motion is respectfully submitted in response to Appellants' Jurisdictional Statement.

ARGUMENT

1. *The constitutionality of the Akron ordinance has not been definitely and finally adjudicated; therefore, a review by the Supreme Court under 28 U.S.C. §1254 is premature.*

The Court of Appeals held that, through its Hazard Communication Standard, OSHA has expressly preempted local regulation of workplace safety in SIC Codes

20 through 39. As this holding applies to the Akron ordinance, the Court of Appeals simply stated:

> It is clear that the ordinance is preempted to the extent that it attempts to regulate employee safety in the workplace in SIC Codes 20-39. However, the ordinance also had as its purpose protection of the public and the providing of information to city fire fighters and public health officials regarding toxic and hazardous substances. It must also be determined whether the preempted provisions may be severed from the balance of the ordinance.
>
> We decline to make these determinations for the first time on appeal. Rather, we will remand this matter to the district court to determine which portions of the ordinance are preempted and whether those portions that are not preempted are severable.

801 F.2d at 834. The Court of Appeals thus made no ruling as to the applicability of its holding to the specific provisions of the Akron ordinance. Because the Court of Appeals did not actually strike down any particular provisions of the Akron ordinance, Supreme Court review of this matter under 28 U.S.C. §1254 (2) is premature.

In *Shaker v. O'Connor*, 278 U.S. 188, 189 (1929), this Court construed §1254 (2)'s predecessor statute as allowing only appeals of "final" judgments. In *South Carolina Electric and Gas Company v. Flemming*, 351 U.S. 901 (1956) (*per curiam*), this Court also followed the finality doctrine espoused in *Shaker* in declining jurisdiction over an appeal taken under §1254 (2).

The finality doctrine has more recently been considered in *City of New Orleans v. Dukes*, 427 U.S. 297 (1976), where the Supreme Court determined that the finality test had been met in an appeal brought under §1254 (2). In

Dukes, the court of appeals had held a grandfather clause in a New Orleans ordinance to be unconstitutional and remanded the case to the district court to determine whether the invalid clause could be severed from the remainder of the ordinance. Finding that the case met the finality test of §1254 (2), the Supreme Court assumed jurisdiction to review the court of appeals' decision. This Court's discussion of the finality doctrine as applied to the facts of the *Dukes* case provides guidelines for determining the propriety of the review at bar. In connection with the ordinance considered in *Dukes,* the Court explained:

> The unconstitutionality of the ordinance, in its application to appellee, has been definitely and finally adjudicated by the Court of Appeals, and only a state-law question remains to be decided on remand—whether the statute will be totally invalidated or whether only its "grandfather provision" will be struck down. There is no federal, much less constitutional, question which is yet to be resolved below. . . . Furthermore, to the extent any "finality" requirement in the context of §1254 (2) might be premised on the policies of avoiding piecemeal appeals or the rendering of advisory opinions, neither difficulty is likely to eventuate in this case; even if we were to uphold the Court of Appeals' remand for a determination of the severability of the "grandfather provision" under state law, the ruling on remand is not one which would be subject to further review in this Court.

427 U.S. at 302.

Unlike the situation in *Dukes,* this case involves both federal and state issues on remand. The District Court has first been instructed to apply the Court of Appeals' standard to each provision of the Akron ordinance to determine which portions of the ordinance involve workplace

hazard communication and are thus preempted. Second, the District Court must decide whether the preempted provisions may be severed from the remainder of the ordinance. This second determination requires application of only state law. However, the first determination deals with a federal issue. Because there is still a federal question involved in deciding which provisions of the Akron ordinance will be preempted, a ruling on remand in this case may be subject to further review in this Court. Thus, this case does not meet the finality test and is not yet ready for review.

2. *As prevailing and non-aggrieved parties, the Appellants lack standing to invoke appeal jurisdiction pursuant to §1254 for review of the Court of Appeals' holding that the Occupational Safety and Health Act does not preempt local regulation of workplace safety.*

Appellants have advanced two questions for consideration by this Court. First, Appellants ask this Court to review the Court of Appeals' holding that the OSH Act does not preempt local regulation of workplace practices which are governed by OSHA's Hazard Communication Standard. Second, Appellants ask the Court to review the Court of Appeals' holding that the OSHA standard does preempt local regulation of workplace practices which are regulated by the standard. *See* Jurisdictional Statement at i.

Assuming, *arguendo,* that Appellants have standing to invoke this Court's jurisdiction under 28 U.S.C. §1254, they have standing to seek review of only the second issue advanced by them—whether the OSHA standard has preemptive effect upon local regulation. The first issue, the OSH Act's preemptive effect upon local regulation, is an issue upon which Appellants prevailed in both the District

Court and the Court of Appeals. As parties not aggrieved with respect to this issue, Appellants simply do not have standing to invoke Supreme Court jurisdiction for further consideration.

Foreclosing Appellants from securing further review of the issue of OSH Act preemption is in keeping with the Supreme Court's long-standing policy of exercising judicial restraint. In *Spector Motor Service, Inc. v. McLaughlin,* 323 U.S. 101, 105 (1944), this Court enunciated that policy as follows:

> If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable.

Adjudication is not unavoidable if an appellant or petitioner under 28 U.S.C. §1254 has not been aggrieved by the lower court's decision and the appellee or respondent, the party who has been aggrieved, does not cross-appeal for review of the decision. Thus, this Court has held that "[o]n certiorari only so much of the judgment below as was adverse to the petitioner is reviewable." *Lloyd Sabaudo Societa Anonima Per Azioni v. Elting,* 287 U.S. 329, ¶1 *syllabus* (1932). In the case at bar, the Court of Appeals' holding that OSHA's standard has preemptive effect over local regulation was "only so much of the judgment below as was adverse" to the Appellants. Therefore, only the issue of the *standard's* preemptive effect is now reviewable.[5]

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[5]The Appellants argue that the question of OSH Act preemption of local regulation is "substantial and would necessarily have to be reexamined in connection with this appeal." Jurisdictional Statement at 13.

(Continued on next page)

3. *This case presents no substantial questions not previously decided by this Court and does not warrant plenary consideration by this Court.*

The Court of Appeals held that OSHA's standard preempts local regulation of workplace safety in SIC Codes 20 through 39. Based upon an application of the Supreme Court's prior rulings, the Court of Appeals properly decided this issue. Because the propriety of OSHA preemption of local regulation is clearly supported by existing law on agency preemption, and because Appellants have cited no case law in support of their contrary position, plenary consideration of this issue by the Supreme Court is not warranted.

In its standard, OSHA included the following language regarding the standard's purpose and its preemptive effect:

> (2) This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of section 18 of the Occupational Safety and Health Act (29 U.S.C.

(Continued)

However, Appellants give no reason for the purported necessity of reexamining this question in the context of this appeal. That the question may be substantial is simply not reason to warrant review by the Supreme Court. This Court has refused to review issues it has characterized as important where the aggrieved party has not cross-petitioned for their review. *See Brennan v. Arnheim & Neely, Inc.*, 410 U.S. 512, 516 (1973), relying upon *NLRB v. International Van Lines*, 409 U.S. 48, 52 n.4 (1972). Regardless of the importance of the OSH Act preemption issue, because Appellees, the aggrieved parties herein, have not cross-appealed for its review, it is not before this Court.

651 et seq.) which deals with state jurisdiction and state plans.

29 C.F.R. §1910.1200 (a) (2). It is clear from the above provision that OSHA intended its standard to preempt "state law." It is clear from the preambles to OSHA's final standard and its proposed standard that OSHA's reference to "state law" was intended to mean *all* state law regarding workplace hazard communication, at whatever level, except state law enacted as a state plan approved by OSHA under Section 18 of the OSH Act, 29 U.S.C. §667. For example, in the preamble OSHA published on March 19, 1982, with its notice of proposed rulemaking, the agency explained its intent to promulgate a single, comprehensive federal standard which would eliminate problems apt to result from numerous state *and local* right-to-know laws:

> 5. *Conflicting State and Local Standards.* At the present time, nine states and the city of Philadelphia have enacted unique worker right-to-know laws. Other state and municipal governments, including New Jersey; Ohio, and such cities as Louisville, Kentucky and Santa Monica, California, are in various stages of considering the enactment of similar laws.
>
> The potential for conflicting or cumulatively burdensome state and local laws has been acknowledged by a number of industry representatives, particularly those involved in chemical manufacturing. Since most manufacturers transport their products across state lines, the proliferation of state and local standards may create a burden on interstate commerce. Furthermore, the differences among these standards result in varying levels of protection for employees exposed to the same hazards.
>
> A single, comprehensive Federal Standard for hazard communication would eliminate this conflict,

> decrease the cumulative burden of compliance, and ensure basic protection for all employees.

47 Fed. Reg. 12095 (1982).

Similar comments made in other parts of this preamble and in the preamble to OSHA's final standard further demonstrate the agency's intent to preempt both state and local regulation. For example, in its detailed analysis of the final standard, OSHA explained the standard's preemption provision as follows:

> This preemption will serve to reduce the burden on interstate commerce produced by conflicting state *and local* regulations and will ensure that all employees in the manufacturing sector are accorded the same degree of protection.

48 Fed. Reg. 53334 (1983) (emphasis added).

The Court of Appeals gave effect to the preemptive intent evidenced by the above statements and other comments made in the agency's preambles. First, under *Hillsborough County, Florida v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985), the Court of Appeals noted that state and local laws can be preempted by federal regulations as well as by federal statutes. 801 F.2d at 831. This doctrine has repeatedly been espoused by the Supreme Court. *See, e.g., Fidelity Federal Savings & Loan Assn. v. De La Cuesta,* 458 U.S. 141, 153 (1982); *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 699 (1984); *Louisiana Public Service Commission v. Federal Communications Commission,* 54 U.S.L.W. 4505, 4509 (May 27, 1986). Second, under *Fidelity Federal,* 458 U.S. at 158, the Court of Appeals recognized that "the preamble to a regulation is valid evidence of the administrative construction of the regulation." 801 F.2d at 832-833. That an agency

may make its preemptive intent clear through its preambles is also supported by this Court's comments in *Hillsborough,* 471 U.S. at 718.

In addition to recognizing that OSHA intended its standard to preempt local regulation, the Court of Appeals also found that this preemption was within the agency's authority. 801 F.2d at 833-834. Appellants, however, assert that OSHA exceeded its authority under the OSH Act when it preempted local right-to-know ordinances. In support of this assertion, Appellants advance a number of unconvincing reasons.

First, Appellants believe that OSHA acted outside its authority when it preempted local regulation because "the policy of the Act is to encourage, not exclude, state and local regulation." Jurisdictional Statement at 21. Appellants, however, misrepresent the policy of the OSH Act. The primary purpose and policy of the OSH Act were declared by Congress in Section 2 of the Act:

> (b) The Congress declares it to be its purpose and policy . . . to assure as far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources. . . .

29 U.S.C. §651(b). After making the above declaration, Congress advanced a litany of ways in which it intended to achieve its purpose, including the following:

> (11) by encouraging the States to assume the fullest responsibility for the administration and enforcement of their occupational safety and health laws by providing grants to the States to assist in identifying their needs and responsibilities in the area of occupational safety and health, to develop plans in accordance with

> the provisions of this Act, to improve the administration and enforcement of State occupational safety and health laws, and to conduct experimental and demonstration projects in connection therewith. . . .

29 U.S.C. §651(b)(11). This goal in no way reflects Congressional policy to encourage *local* regulation of occupational safety and health concerns. It does admittedly reflect Congressional policy to encourage *state* regulation of occupational safety and health concerns, which can be accomplished through the states' adoption of state plans approved by the Secretary of Labor pursuant to Section 18 of the Act, 29 U.S.C. §667. However, OSHA's preemption of local regulation does not interfere with any Congressional policy of encouraging state regulation. OSHA's standard expressly acknowledges that a state that wants to assume responsibility for workplace hazard communication may do so in accordance with Section 18 of the OSH Act. *See* 29 C.F.R. §1910.1200(a)(2). Thus, in its preemption of local regulation, OSHA has not contravened Congressional intent that safe and healthful working conditions be achieved by, among other things, encouraging *states* to take over the responsibility for occupational safety and health regulations in accordance with Section 18.

In addition to misrepresenting the policy of the OSH Act, Appellants fail to acknowledge an agency's power to reconcile conflicting policies when administering a Congressionally created program committed to the agency's care. In *Capital Cities Cable, Inc. v. Crisp,* 467 U.S. 691, 699 (1983), this Court repeated its longstanding policy regarding this power in connection with an agency's attempt to preempt local law:

And, as we made clear in *Fidelity Federal Savings and Loan Assn.* v. *De la Cuesta*, 458 U.S. 141 (1982):

> "Federal regulations have no less preemptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily. When the administrator promulgates regulations intended to preempt state law, the court's inquiry is similarly limited: 'If [h] is choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.'" *Id.*, at 153-154, quoting *United States* v. *Shimer*, 367 U.S. 374, 383 (1961).

See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-845 (1984).

Appellees acknowledge that one policy of the OSH Act was to encourage assumption of occupational safety and health regulation by the states. This was not, however, the only policy which OSHA appropriately considered in deciding to preempt local regulation of workplace hazard communication. OSHA also determined it proper to achieve some uniformity in regulation when it promulgated its standard, *partly* in anticipation of the burden on interstate commerce which would be imposed by a multitude of varying state and local regulations. This consideration is evident from statements made by OSHA in the preamble to the proposed and final standard. However,

there is nothing in the preambles to suggest that this consideration was at odds with encouraging state assumption of safety and health regulation or at odds with OSHA's, and Congress', primary objective—to assure safe and healthful working conditions.

As the Court of Appeals observed, "OSHA could legitimately determine that uniformity (resulting from preemption) would aid in the administration and enforcement of, and compliance with, its standard." 801 F.2d at 834. The preamble to the final standard bears out this conclusion. In discussing the need for a uniform federal standard, OSHA summarized comments it had received in response to the publication of its proposed standard. Among the comments considered by OSHA in drafting its final standard where those expressing the following view:

> [A] Federal OSHA Standard, rather than a variety of differing State and local requirements, best serves the interests of the private sector, labor interests, the general public and the Agency itself. . . .
>
> Without a strong Federal role, individual States will enact a variety of diverse labeling rules that would hamper interstate business operations *and impede worker protection.*

48 Fed. Reg. 53283-53284 (1983), quoting from comments submitted to the agency by the National Paint and Coatings Association (emphasis added). OSHA also remarked in its preamble that concerns similar to the above were expressed by *many* of the participants in the rulemaking. 48 Fed. Reg. 53284 (1983). It then agreed "with a majority of the participants in the rulemaking that the need for a Federal standard has been amply demonstrated." *Id.*

The Hazard Communication Standard is unique when compared to other standards promulgated by OSHA. Its primary concern is with imparting information to employees so that they know how best to handle chemicals used in the workplace and to protect themselves from their attendant hazards. In its notice of proposed rulemaking, OSHA pointed out the difference between this goal and the goal of its other health and safety standards:

> The purpose of the proposed hazard communication standard differs substantially from other OSHA regulations. Rather than directly control exposure levels in the workplace, it is designed to enhance employer and employee awareness of the safety and health hazards associated with chemical substances.

47 Fed. Reg. 12112 (1982). While more regulation might be better in connection with controlling exposure levels in the workplace, more regulation is not necessarily better in connection with communicating important information to employees. Because of the information disclosure nature of the Hazard Communication Standard, it is quite feasible that compliance with numerous and differing state and local right-to-know laws would, as the comments to OSHA's proposed standard pointed out, actually impede worker protection.[6] Due to this potential, preemption of

[6]Comparison of the Akron ordinance with OSHA's standard illustrates this. The Hazard Communication Standard requires each container of hazardous chemicals to be labeled with the chemical or common name of the chemical contained within. 29 C.F.R. §1910.1200(f)(1)(i). This may be a designation developed by the International Union of Pure and Applied Chemistry ("IUPAC") or the Chemical Abstracts Service ("CAS") rules of nomenclature *or* another designation or identification that is a "common name." *See* 29 C.F.R. §1910.1200(c). In addition to OSHA's labeling requirement, under §1830.07 of the Akron ordinance a requirement to place up to four

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local regulation is not at all at odds with the primary Congressional goal of providing protection in the workplace. Rather, preemption of literally thousands of local laws would actually aid in hazard communication by assuring that employees are presented only with clear and effective hazard information.

OSHA without doubt intended that the effectiveness of its standard in communicating hazards to employees not be undermined or weakened by a variety of laws. This is also evident from OSHA's discussion of its approval of

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additional labels on containers of hazardous chemicals could be imposed upon regulated employers. First, the Akron ordinance requires each container of hazardous chemicals to be labeled with the CAS or the IUPAC name of the chemical in the container, and does not alternately allow any other designation or identification. An upstream chemical manufacturer located outside of Akron but supplying his chemical to an Akron employer may, under the OSHA standard, place a label on the container with a common name which is neither a CAS nor an IUPAC name. Therefore, to be in compliance with the Akron ordinance, the Akron employer would have to add a label with the CAS or the IUPAC name to the container.

Second, if the hazardous chemical is listed as a carcinogen on the Master List prepared under §1830.05 of the Akron ordinance, its container would also need to be marked by the employer with a cancer warning pursuant to §1830.07(a)(3). This would not be required under the OSHA standard. Third, if the substance also poses a reproductive hazard, a label setting forth a reproductive warning would also be required under the Akron ordinance, §1830.07(a)(4). Finally, §1830.07(a)(2) of the Akron ordinance requires labeling with Department of Transportation ("DOT") required labels for all substances regulated by the DOT. Therefore, if the subject chemical is regulated by the DOT, the Akron ordinance would require yet another label, not required under the OSHA standard, to be placed on its container. Rather than assisting in the communication of information to employees, all of these labels may well confuse employees and impede hazard communication, contrary to the intent Congress and of the standard.

state plans submitted to the Secretary of Labor under Section 18 of the OSH Act. Again, OSHA indicated its intent that state standards with additional requirements would not be allowed to interfere with the effectiveness of the federal standard:

> Section 18(c), 29 U.S.C. 667(c), authorizes the Secretary to approve the submitted plan only if the state plan provides for standards and a plan for their enforcement which are, *inter alia*, "at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under Section 6 which relate to the same issues."
>
> While questions of effectiveness and commonality of issues must be resolved on an *ad hoc* basis, in general the Secretary intends to scrutinize carefully any state law or regulation submitted under an approved state plan which contains any hazard determination or communication requirements which are applicable to chemical manufacturers or other employers in SIC Codes 20-39. *The purpose of this review is to assure not only equal or greater effectiveness but also that any additional requirements contemplated by the state do not conflict with or adversely affect the effectiveness of OSHA's standard.*

48 Fed. Reg. 53322-53323 (1983) (emphasis added). This demonstrates that OSHA did consider the impact of outside regulation on the *effectiveness* of OSHA's standard and not just on its burden to employers. Its also demonstrates that OSHA was not averse to more stringent requirements and that it had worker protection foremost in mind. However, worker protection was, OSHA believed, best accomplished through implementation of *one* effective standard, whether that be the federal standard

or an approved state standard that supplanted the federal standard.

Contrary to Appellants' assertion, OSHA did not exceed its authority under the OSH Act when it preempted local regulation of hazard communication in the workplace. It carefully weighed and reconciled various policies under the Act. The agency's decision to completely preempt local regulation and to approve state plans only after careful scrutiny is completely compatible with its primary desire and intent to effectively communicate workplace hazards to employees—also the Congressional primary goal. OSHA's preemption choice "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute." *Capital Cities Cable*, 467 U.S. at 699.

Appellants, however, apparently believe that an accommodation of policies was beyond OSHA's authority. In their Jurisdictional Statement, Appellants argue that the role of the Labor Department under the OSH Act is "quite limited" and that it "does not have plenary authority to interpret or administer the Act." Jurisdictional Statement at 21. This, Appellants assert, is the second reason the agency purportedly exceeded its authority by preempting local regulation. However, there is no support for Appellants' claim that the role of the agency under the Act is so limited.

In citing the Labor Department's authority under the OSH Act, Appellants mention only its authority to promulgate occupational safety and health standards pursuant

to Section 6, 29 U.S.C §655.[7] The Labor Department, however, has very broad regulatory authorities under the OSH Act. For example, under Section 8(g)(2) of the Act, 29 U.S.C. §657(g)(2), the Secretary of Labor is authorized to "prescribe such rules and regulations as he may deem necessary" to carry out his responsibilities under the Act. Under Section 18, 29 U.S.C. §667, the Secretary has authority to review, approve or reject state plans; to engage in a continuing evaluation of the implementation of state plans which have been approved; and to withdraw previously granted approvals of state plans that are not complied with. The Secretary has broad enforcement authority under Section 9, 29 U.S.C. §658, and may issue citations to employers for violations of their duties under the Act, OSHA's rules, its standards, regulations or orders. Under Section 8, 29 U.S.C. §657, the Secretary may enter, inspect and investigate places of employment; require attendance and testimony of witnesses and production of evidence under oath; and prescribe regulations requiring employers to maintain records and submit reports. The Secretary has authority under Section 20, 29 U.S.C. §669, to develop plans for and conduct research, experiments, and demonstrations regarding occupational safety and health; to disseminate related information to employers and employees;

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[7]Appellants then rely upon the definition of "occupational safety and health standard" found in Section 3(8), 29 U.S.C. §652(8), to conclude that the Act "does not give the Department authority to preempt local ordinances dealing with the same subject matter." Jurisdictional Statement at 21. Appellants are apparently suggesting that Congress must *expressly* grant an agency preemption powers before that agency may preempt state law. This is simply not correct. This Court has made it quite clear that an agency may preempt state regulation in the absence of an expression of preemptive intent by Congress provided it meets the standards set out in *Capital Cities Cable*, quoted *supra*, and its antecedents. An express Congressional grant of authority to preempt is not required.

to establish programs for medical examinations and tests; and to prescribe regulations necessary for implementation of research and related activities.

The above authorities certainly give the Secretary broad responsibility to administer and discretion to interpret the Act in a manner he believes best accomplishes the objectives of the Act—occupational safety and health. Therefore, under the authority of *Capital Cities Cable, supra*, the Court's review of OSHA's preemption must be limited to determining whether the Secretary's choice to preempt local regulation represents a "reasonable accommodation of conflicting policies." As already demonstrated, preemption of local laws regulating hazard communication in the workplace does represent such an accommodation.

Appellants also question OSHA's preemption authority because, to their knowledge, this Court has never examined an agency's preemption of an "entire field" of state regulation. Jurisdictional Statement at 19. Appellants suggest that an agency's effort to preempt an entire field of state regulation, as opposed to a specific provision of state law, "requires close judicial examination." Jurisdictional Statement at 20. In support of this assertion, Appellants provide the following explanation:

> Unlike the Congress, whose members represent their respective states, federal administrators have no allegiance to state interests and have an inevitable bias in favor of federal regulatory policies. For this reason, the deference that courts customarily grant to administrative decisions in other areas . . . is inappropriate with respect to administrative preemption of state and local law.

Jurisdictional Statement at 20-21.

After claiming a distinction between preemption of a specific provision of state law and preemption of an entire field of regulation, Appellants fail to explain why preemption of an "entire field" would require closer judicial scrutiny than preemption of a specific provision of state law. Are Appellants suggesting that an agency's purported bias in favor of federal regulatory policies appears only when it preempts an "entire field" of state regulation? Appellants' rationale in support of further scrutiny by this Court simply fails to demonstrate why this case should be measured by a standard different from the standard repeatedly used by this Court in other agency preemption cases that deal with "specific provisions", and not an "entire field", of state law. The Supreme Court's standard for reviewing administrative preemption is clear, and Appellants advance no legitimate reason for this Court's reconsideration of that standard.

Furthermore, if Congress is concerned that agencies might preempt local laws when Congress feels preemption would not be appropriate, it can easily fashion its statutes to expressly allow for local regulation. In fact, Congress has recently done just that. The recently enacted Title III of the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. §11000 *et seq.*, is an Emergency Planning and Community Right-to-Know Act ("Community Right-to-Know Act"). Section 321 of the Community Right-to-Know Act, 42 U.S.C. §11041, expressly recognizes the right of local governments to enact legislation governing the subject regulated by the Community Right-to-Know Act. This section specifically provides that nothing in the federal act shall preempt state or local law in the area of

community right-to-know.[8] Congress could just as easily have included a provision in the OSH Act which would expressly provide for local regulation of occupational safety and health concerns.

Although Appellants advance a number of reasons why OSHA should not have preempted local regulation of workplace hazard communication, they cite no case law to support their reasons. This is because there is no law favorably applicable to the Appellants' position. Cases previously decided by this Court all support OSHA preemption. Because this case presents no substantial questions *not* previously decided by this Court, it does not warrant this Court's plenary consideration.

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[8]Enactment of the Community Right-to-Know Act also addresses another concern expressed by Appellants. Appellants lament that "at stake in this case is not merely the validity of one local ordinance, but the right of all local governments to enact 'right-to-know' legislation to protect the health and safety of their citizens." Jurisdictional Statement at 12. Appellant's characterization of the ante in this case is excessively broad. This case involves preemption of local laws regarding hazard communication only as they relate to workers in the manufacturing sector. It does not involve hazard communication to workers in other employment arenas. More important, it does not involve the right of local governments to enact *community* right-to-know legislation. This right is clearly established in §321 of the Community Right-to-Know Act.

CONCLUSION

For the foregoing reasons, Appellants respectfully move this Court to dismiss the appeal of this case or, in the alternative, to affirm the decision of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

C. WILLIAM O'NEILL

VORYS, SATER, SEYMOUR AND PEASE
52 E. Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6336
Counsel of Record

JOHN W. HOBERG
DUKE W. THOMAS
MARCIA J. MENGEL

VORYS, SATER, SEYMOUR AND PEASE
52 E. Gay Street, P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400
Attorneys for Appellants

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